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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT

THE MONTPELIER & WELLS RIVER RAILROAD

Plaintiff in Error

v.

UNITED STATES

Defendant in Error

Brief for Defendant, in Error

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UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

THE MONTPELIER AND WELLS RIVER RAILROAD, Plaintiff in error,

v

UNITED STATES, defendant in error.

BRIEF FOR DEFENDANT IN ERROR

STATEMENT

Writ of error upon a judgment of conviction entered in the District Court against the plaintiff in error. The plaintiff in error was prosecuted under the statute prohibiting an unlawful discrimination in freight rates. It owns and operates a Railroad extending from Montpelier, Vermont, easterly to Wells River, Vermont, a distance of thirty-nine miles. The freight rate established by joint agreement between the several railroads (not including the plaintiff in error) over which coal was shipped from Echo, Pa., to Montpelier, Vt., was $3.55 per gross ton. The freight rate established by joint agreement between the several railroads, including the plaintiff in error, over which coal was shipped from Echo, Pa., to East Montpelier, a station six miles east of Montpelier, and on the plaintiff's road, and Wells River the eastern terminal of the plaintiff's road, and all intervening stations was $3.80 per gross ton. Under the last named joint agreement of the several roads, the plaintiff in error received 75 cents per ton as its share of the joint freight rate, of $3.80. The defendant bought coal in Echo, Pa., and billed it to Wells River, Vt., receiving as its share of the joint rate, aforesaid 75 cents. The coal so bought and billed to Wells River was delivered to Montpelier, and, by the plaintiff in error, put into its coal pockets, situated in Montpelier about six-tenths of a mile easterly of the Central Vermont Station at Montpelier. By billing to Wells River, when in fact the coal was shipped only to Montpelier and was deposited in the plaintiff's coal pockets, secured to the plaintiff in error, delivery of coal in Montpelier for $3.05 per gross ton instead of $3.55, the lawful rate as provided by the joint tariff rate, thereby securing a preference of 50 cents a gross ton.

ARGUMENT

I

The trial court did not commit error in refusing, at the close of all the evidence, to direct a verdict for the defendant. The defendant offered no evidence. The plaintiff's evidence showed that there was on file in the office of the Inter-state Commerce Commission, a schedule of rates on bituminous coal, in November and December 1909, from Echo, Pa., to Montpelier, Vt., which provided among other things, that the rate from Echo, Pa., over the various railroads to Montpelier, Vt., was three dollars and fifty-five cents a gross ton. (Trans. pp. 33-36.) This tariff schedule also provided "All stations from which these rates apply are specified. To any point of destination not mentioned in this tariff, but between any two points of destination named, the rate will be the same as to the next more distant point that is named." This schedule was known as joint tariff rate No. 370, and was made and filed by the Buffalo, Rochester and Pittsburg, Railroad Company. (Trans. pp. 36-39) The same company had also placed on file in the office of the Inter-state Commerce Commission, schedule No. 3 the same being supplementary to joint tariff rate No. 370 above referred to, showing the rate on coal in November and December 1909, from Echo, Pa., to points on the Montpelier and Wells River Railroad. This rate schedule named three dollars and eighty cents a gross ton as a rate to East Montpelier and Wells River, and all intermediate stations. There was also on file in the same office, a writing showing that the Montpelier and Wells River Railroad Company assented to, and concurred in the publication and filing of any rate schedule or amendment thereto, which the Buffalo, Rochester and Pittsburg Railroad Company should make. (Trans. pp. 39-40.)

There were also in evidence way bills showing that various cars of coal were billed from Echo, Pa., to Wells River, Vt. It was shown that these cars of coal were delivered to the Montpelier and Wells River Railroad at its coal pockets which were located within the municipal boundaries of Montpelier and about six-tenths of a mile from the Central Vermont Railroad station, *and said coal pockets were within the yard limits of the Montpelier and Wells*

River Railroad. It was also shown that under the arrangement between the Montpelier and Wells River Railroad and the other railroads over which the coal was shipped from Echo, Pa., to Montpelier, Vt., the Montpelier and Wells River Railroad Company received seventy-five cents a gross ton as its proportion of the joint rate of three dollars and eighty cents.

On this evidence the plaintiff below made a *prima facie* case, or at least it had a right to go to the jury upon the question whether or not the coal pockets were in Montpelier, (the defendant below claiming they were not, but that they constituted an intermediate point of delivery.) The defendant below bought coal in Echo, Pa., and billed it to Wells River which took the three dollars and eighty cent rate out of which it received seventy-five cents as its share of the transportation charges when in fact it was delivered at defendant's coal pockets in Montpelier, thereby securing its coal in Montpelier at three dollars and five cents a gross ton, when, if the coal had been billed to Montpelier, the rate would have been three dollars and fifty-five cents a ton. The defendant thereby secured a preference or discrimination of fifty cents a gross ton.

The Court should not direct the jury to find a verdict for the defendant unless the conclusion follows as a matter of law that no recovery can be had upon any view which can be properly taken of the facts which the evidence tends to establish.

In the case at bar, reasonable men might differ as to whether the coal pockets were or were not in Montpelier, hence to have directed a verdict would have been error.

Pheonix Assurance Company v. Lucker, 77 Fed. 234.

Tex. & Pass. R. R. Co. v. Cox, 145 U. S., 593.

II.

The trial court committed no error in refusing to charge the jury that "The point of destination being between two points named in the tariff, and the more distant point taking the rate of three dollars and eighty

cents, and being on defendant's line of railroad, the defendant is entitled to the division or rate of seventy-five cents per gross ton, and should be acquitted." The whole case turned upon the point of whether the coal pockets of the defendant where the coal was delivered, were or were not in Montpelier. This was the mooted question, and the fact for the jury to determine unless as suggested upon the evidence was all with defendant in error. It would have been error for the court to have held as a matter of law, that the coal pockets were not in Montpelier, hence, between two points named in the schedule, and therefore took the $3.80 rate.

It was upon this theory that the case was submitted to the jury. In fact the evidence was so conclusive that the coal pockets were in Montpelier, that is is difficult to see how there was room for two opinions on this subject. If Montpelier is to be treated as a station within the supplementary joint tariff schedule to which the plaintiff in error is a party, that must mean Montpelier station of the plaintiff in error and it is impossible to reach an intermediate point between Montpelier and East Montpelier until they have departed from Montpelier and it is hardly conceivable that they can have departed from Montpelier *when they are in the freight yards at Montpelier and* only a short distance from the passenger station.

III, IV, V.

It was not error for the trial court to refuse to comply with the defendant's requests as set forth in the third, fourth and fifth assignments of error. As has already been said the whole case turned upon the question whether the defendant's coal pockets were or were not in Montpelier, giving that word the construction intended to be given it by the Statute. Under the defendant's contention Montpelier was a mere point having no length, breadth or area. To have charged the jury as requested by the defendant would have diverted their minds from the only issue in the case. The question was fully and fairly presented

to the jury by the court in its charge as follows. "I am going to leave it with you to say whether those pockets, in which this coal was deposited by the defendant company, are, under the contract, at Montpelier." (Trans. p. 73.)

VI.

The charge of the trial court to the jury, as set forth in the defendant's sixth assignment of error, was proper. The joint freight rate schedule No. 370 naming three dollars and fifty-five cents a gross ton as the rate from Echo, Pa., to Montpelier, Vt., did not include any portion of the defendant road. The freight rate schedule No. 3 supplementary to No. 370, named three dollars and eighty cents a gross ton, as the rate from Echo, Pa., to East Montpelier and Wells River, and all intermediate stations. This covered the defendant road. The defendant made the claim that its coal pockets, where the coal was delivered, was an intermediate point, between two stations, and hence under the provision of the joint tariff rate No. 370, took the three dollars and eighty cent rate, the same being the rate of the point named next farthest beyond the coal pockets. The defendant also urged that while supplementary schedule No. 3 named East Montpelier as the first station, it must be read as though Montpelier was named therein by reason of its being a supplement to the joint rate schedule No. 370, which did name Montpelier. We submit under this contention "Montpelier Station" may mean either the Central Vermont Station which is not on the defendant road or the station of the Montpelier and Wells River Railroad which is on the defendant road.

VII.

The charge of the court as set forth in the defendant's seventh assignment of error was sound. The only issue in the case was whether the coal pockets, where the coal in

question was delivered were or were not in Montpelier. This question was one of fact and was properly referred to the jury.

While there was no dispute as to the exact situation or location of the coal pockets, there was a dispute as to whether they were or were not in Montpelier.

Questions as to place or locations are questions of fact. *23 Am. & Eng. Enc. of Law* (2d ed.) 582.

In Cook vs. State 83, Ala. 62 (3 Am. St. Rep. 688) the defendant was indicted for arson under a statute, which provided among other things a penalty for "willfully setting fire to, or burning a barn or other building within the curtilage of a dwelling house." The defendant asked the court to rule as a matter of law that the barn burned was not within the curtilage of a dwelling. The court refused so to rule, and in its opinion said, "Many cases may and do arise in which it can be affirmed as a matter of law, that a given house or structure is, or is not within the curtilage. * * * * *We hold that the testimony in this case was of that indeterminate character which should have been passed on by the jury and the circuit court did not err in refusing to instruct them that, as matter of law, the barn was not within the curtilage."

Doe vs. Paine, 4 Hawks 64, (15 Am. 50.7) was an action of ejectment in which the boundaries of the land in question were in issue. In the course of the opinion the court said, "What are the termini or boundaries of a grant or deed is a matter of law. Where these boundaries or termini are is a matter of fact. It is the province of the court to declare the first, that of the jury to ascertain the second."

Hurley vs. Morgan (N. C.) 28 Am. Dec. 579.

Whether the coal pockets of the defendant were or were not in Montpelier, is no less a question of fact because the evidence was undisputed as to their location.

It is said in 23 Am. & Eng. Enc. of Law, second edition, 560, "In many cases where the facts are undisputed the effect of them is for the court and not for the decision of the jury. Certain facts, however, may be supposed to be clearly established from which one sensible, impartial man would draw one inference, and another man equally sensible and

equally impartial would draw another inference, e. g., in cases where the question is one of negligence or contributory negligence; and it is this class of cases, *and those akin to it, that the law commits to the decision of a jury, even where there is no conflict of evidence.*"

Sioux City etc. Railroad Company vs. Stout, 17 Wall., 657.

Ohio Etc. Railroad Company vs. Collam 73, Ind. 281 (38 Am. Rep. 134.)

The judgment of the District Court should be affirmed.

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